

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
DENNIS L. STREETER,) CASE NO. 05-66419 JPK
) Chapter 7
Debtor.)

NANCY J. GARGULA,)
Plaintiff,)
v.) ADVERSARY NO. 09-2071
DENNIS L. STREETER,)
Defendant.)

MEMORANDUM OF DECISION ON MOTION TO
DISMISS ADVERSARY COMPLAINT WITH PREJUDICE ("MOTION")

This adversary proceeding was initiated by Nancy J. Gargula, United States Trustee ("United States Trustee"), by a complaint filed electronically in the Court's CM/ECF Electronic Filing System. The electronic receipt generated at the time of the filing of the complaint states:

Notice of Electronic Filing

The following transaction was received from Prokop, Jennifer entered on 3/3/2009 at 0:07 AM EST and filed on 3/3/2009

Case Name: Gargula v. Streeter
Case Number: 09-02071-jpk
Document Number: 1
Case Name: Dennis L Streeter
Case Number: 05-66419-jpk
Document Number: 388

Docket Text:
Adversary case 09-02071. (41 (Objection / revocation of discharge - 727(c),(d),(e))) Complaint by Nancy J. Gargula against Dennis L Streeter. Fee Amount \$250. (Prokop, Jennifer)

In compliance with a Notice of Extension Pursuant to N.D.Ind.L.B.R. B-9006-1, the Motion was filed by the defendant Dennis L. Streeter ("Streeter")¹ on May 1, 2009. The contention of the Motion is that the complaint was not timely filed and must therefore be dismissed. There is no

¹ Streeter is the debtor in Case Number 05-66419, pending before the court as a case under Chapter 7.

dispute that the deadline for filing the complaint was established by an order of the court entered on October 27, 2008 [record entry #379 in case number 05-66419], which granted the United States Trustee's Fourth Motion to Extend Time for Filing a Complaint to Deny Discharge filed on October 23, 2008 [record entry #374 in case number 05-66419]. With respect to the designated deadline, the October 27, 2008 order stated:

IT IS THEREFORE ORDERED that the United States Trustee be, and hereby is, granted a fourth extension of time for filing a complaint to deny the Debtor's discharge pursuant to 11 U.S.C. § 727 to and including March 2, 2009.

There is no dispute that the deadline for filing the complaint was March 2, 2009. There is no dispute that the complaint was electronically filed at 12:07 A.M. on March 3, 2009, Eastern Standard Time. There is no dispute that the complaint was electronically filed at 11:07 P.M. on March 2, 2009, Central Standard Time. There is no dispute that the Hammond Division of the United States Bankruptcy Court for the Northern District of Indiana is located in the Central Standard Time zone. Finally, there is no dispute that Paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing of the United States Bankruptcy Court for the Northern District of Indiana states the following:

8. Time of Electronic Filing:

Except in the case of documents presented for filing in a hard copy format, a document filed electronically is deemed filed as of the date and time stated on the "Notice of Electronic Filing" generated by the court's ECF System, which is the time the court's ECF server receives the electronic transmission. Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight in South Bend, Indiana, where the court's ECF server is located, to be considered filed that day.

Streeter's Motion asserts that the United States Trustee's complaint was not timely filed in accordance with the deadline established by Fed.R.Bankr.P. 4004(a), as extended by the court's October 27, 2008 order entered pursuant to Fed.R.Bankr.P. 4004(b), and must

therefore be dismissed. The United States Trustee counters that the complaint was timely filed in the time zone in which the Division of the United States Bankruptcy Court for the Northern District of Indiana to which the case was assigned is located, and that in addition for other reasons the complaint should be deemed timely filed.

The court has jurisdiction over the adversary proceeding and the matters addressed by the Motion pursuant to 28 U.S.C. § 1334(a) and (b); 28 U.S.C. § 157(a) and (b); and N.D.Ind.L.R. 200.1(a). The dispute before the court is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

The mechanism for determination of the Motion was stated in the court's docket order of December 10, 2009 [record entry #16] as follows:

Docket Entry: Telephonic Hearing held on 12/10/09 RE:(related document(s) 8 Motion to Dismiss Case filed by Defendant Dennis L Streeter. APPEARANCES: Atty. Prokop on behalf of Plaintiff and Atty. Blaskovich on behalf of Defendant. It is ORDERED as follows with respect to further proceedings concerning the defendant's motion to dismiss filed on 5/1/09 and the plaintiff's objection thereto filed on 6/1/09: (1)By 2/1/10 the parties shall file a stipulation of facts material to the motion and objection and the defendant shall file a legal memorandum with respect to his contentions. (2)By 3/8/10 the plaintiff shall file a legal memorandum with respect to its contentions/in response to the plaintiff. (3)By 3/22/10 the defendant shall file a reply memorandum. (pg) (Entered: 12/10/2009)

In accordance with that order, the parties filed their Joint Stipulation of Facts on February 1, 2010. The stipulation is as follows:

JOINT STIPULATION OF FACTS

Come now the Plaintiff/United States Trustee ("UST"), by counsel Jennifer W. Prokop, and the Defendant/Debtor ("Debtor"), by counsel David M. Blaskovich, and, pursuant to Docket Entry 16 filed on December 10, 2009, respectfully file this Joint Stipulation of Facts:

1. Debtor Dennis L. Streeter filed his petition for Voluntary Relief under Chapter 11 of the United States Bankruptcy Code on October 7, 2005, case number 05-66419.

2. On December 21, 2007, Chapter 11 case number 05-66419 was converted to Chapter 7.
3. The original deadline to file a complaint objecting to the Debtor's grant of a discharge was March 31, 2008.
4. The UST filed motions to extend the deadline to file a complaint objecting to discharge and this Honorable Court extended the deadline to and including March 2, 2009, to file a complaint.
5. Trustee Gordon Gouveia filed motions to extend the deadline to file a complaint objecting to discharge and the March 5, 2009, Order provides that "the Trustee is granted an extension of time until March 2, 2009 to file a Complaint to Withhold Discharge, or until such earlier time as the Final Report or a Report of No Distribution is filed in this matter."
6. Counsel for the UST became licensed to practice law in Indiana in November 2001.
7. From November 2001 until January 2004, Counsel practiced only in Indiana State courts, primarily, if not exclusively, in Lake and Porter Counties in Indiana.
8. Both Lake and Porter County were and are located in the Central Time Zone and both counties observed and still observe Daylight Savings Time.
9. In January 2004, Counsel for the UST took the ECF/PACER instructional class at the U.S. Bankruptcy Court, South Bend Division.
10. From January 2004 and until March 2006, Counsel practiced in the U.S. Bankruptcy Court for the Northern District of Indiana, almost exclusively in the South Bend Division in South Bend, Indiana.
11. The South Bend Division is located in St. Joseph County, Indiana, which is in the the (sic) Eastern Time Zone.
12. From January 2004 to March 2006, Counsel for the UST did not enter an appearance in any case that was not in the Eastern Time Zone.
13. Beginning in May 2006, Counsel for the UST joined the U.S. Trustee's Office in South Bend, in the Eastern Time Zone.
14. Counsel for the UST was assigned to cases filed in the Hammond Division, which is located in the Central Time Zone, and to cases in the Hammond Division at Lafayette, which is located in the Eastern Time Zone.
15. Counsel for the UST practiced in the Hammond Court, in the Central

Time Zone, which was an hour behind South Bend for one half of the year and on the same time for the other half of the year (At the time, South Bend did not observe Daylight Savings Time).

16. Since 2006, there have been changes in Indiana regarding the implementation of Daylight Savings Time for the entire State, and there were some changes to the Time Zone lines as well.
17. Counsel for the UST's involvement in bankruptcy cases since 2006 was and is almost exclusively limited to Hammond, Indiana, and the Central Time Zone.
18. Counsel for the UST maintains two calendars, an electronic and a paper calendar.
19. Counsel for the UST has both the Central and Eastern time zones showing on her electronic calendar.
20. Counsel for the UST notes in her paper calendar, by hand, the time for each Hammond Court matter, in which she is involved, in both Eastern Time and Central Time by noting both the "South Bend Time" and the "Hammond Time" for each and every hearing or bankruptcy-related event (such as a Meeting of Creditors or Rule 2004 Examination).
21. On September 22, 2005, the Judges of the U.S. Bankruptcy Court for the Northern District of Indiana Entered the Fifth Amended Order Authorizing Electronic Case Filing.
22. Paragraph 8 of this Fifth Amended Order provides that that (sic) "[f]iling must be completed before midnight in South Bend, Indiana, where the court's ECF server is located, to be considered filed that day."
23. A copy of this Order is posted on the Bankruptcy Court's Website, under "Contents", under "Publications," under "General Orders," under the heading: "Electronic Case Filing (9/22/05)."
24. Counsel for the UST admits that she did not know that filings needed to be completed by 11:00 p.m. Central Time to be considered filed on a particular date.
25. Counsel for the UST completed filing an Adversary Complaint objecting to Debtor's discharge on March 2, 2009, at 11:07 p.m. Central Time.
26. The action initiated by the UST is this cause of action, case number 09-02071.
27. The ECF Receipt shows that the UST's complaint was filed at "0:07 AM EST", i.e. Eastern Standard Time on March 3, 2009.

28. Counsel for the UST filed her complaint in good faith.
29. On or about May 1, 2009, the Debtor/Defendant filed a motion to dismiss the UST's Adversary Complaint 09-02071 alleging that the complaint was not timely filed.
30. The Debtor did not file a separate supporting brief on May 1, 2009, as required by L.B.R. B-7007-1(a).
31. In September 2008, the Committee on Rules of Practice and Procedure submitted a Report to the Judicial Conference suggesting several changes to the way in which time is computed in the Federal Rules of Bankruptcy Procedure.
32. The Report describes the results found by the Time-Computation Subcommittee and its work on the Time-Computation Project, a project initiated to address the "frequent complaints about the time, energy, and anxiety expended in calculating time periods, the potential for error, and the anomalous results of the current computation provisions" of the then-current Federal Rules. [Report, p. 3, at <http://www.uscourts.gov/rules/supct0309.html>].
33. Specifically addressed in the above report was the computation of time in relation to electronic filing.
34. In March 2009, effective December 1, 2009, Bankruptcy Rule of Procedure 9006(a)(4) was amended to provide that the "last day" of a period for electronic filing ends "at midnight in the court's time zone" unless a different time is set by a statute, local rule, or order in the case".

The issue before the court with respect to the Motion is solely whether the complaint was or was not timely filed in accordance with applicable law and rules, and resultingly whether or not the complaint should be dismissed.²

The issue before the court actually has two separate components: the location of delivery of the complaint, and the time required for delivery to that location.

² On March 24, 2010, the United States Trustee filed the "United States Trustee's AMENDED Motion to Extend Time Pursuant to Fed. R. Bankr. P. 9006(b)(1), or in the Alternative, for Relief from the Fifth Amended Order Authorizing Electronic Case Filing, Entered September 22, 2005". Further proceedings with respect to the amended motion were established by the court's docket order entered on April 29, 2010 in case number 05-66419 [record entry #400]. Issues raised by that motion are not included in the determination of Streeter's motion to dismiss, and will be addressed by a separate order of the court.

Just as mankind apparently invented the wheel to alleviate the cumbersome job of dragging things from one point to another, mankind invented media for the transmission of written material. Ultimately paper was invented as a convenient, light-weight mechanism for the transmission of writing from one location to another. Being a tangible substance, actual delivery of written material by means of writing on paper could only be effected by physical delivery of the paper medium to a recipient or to a location.

Before the advent of computers and electronic transmission, there was facsimile transmission. Under this mechanism, a written document could be copied by the transmitter, sent through telephone lines to a machine at the location of the designated recipient, and then reproduced by the recipient into tangible written form through the use of the machine. Thus, if one were to view the receipt by the recipient's machine as actual delivery of a written document, one could arguably say that the document was delivered to the recipient when the recipient's machine received the document in a form sufficient to allow the machine to reproduce the document for review by the recipient. Thus, in a world in which deadlines for delivery of written documents was at times a critical issue, it became possible for the party having the obligation to deliver the document by a stated deadline to assert that although the physical delivery location of the recipient, such as an office, was closed at 5:00 P.M. and thus physical delivery to that office was impossible, a facsimile transmission of the document was received in the office's fax machine on the date on which the document was due, albeit not by means of personal, physical delivery of the document. And then came electronic transmission, a medium for transmission of written material which involves in essence a stream of electrons sent to a machine called a "server" which then in turn forwards the stream of electrons to a designated location at which another machine can reproduce the stream of electrons into the form of a tangible written document. As was true with facsimile transmission, electronic transmission allows for the argument that a "document" has actually been delivered at the time the stream of electrons

reaches the server mechanism responsible for forwarding the stream of electrons to the recipient for reproduction into a tangible product.

In the context of filings with the court, back in the day (before facsimile and electronic transmissions), the only mechanism for actually filing a document with the court was by means of physical delivery of the document to the court. In most cases, this meant that the party required to file the document had to appear in the court office in which the document was required to be filed during ordinary business hours of that office. In order to accommodate the fact that many documents were filed with the courts by use of mail, rules were developed by which deposit in the mail would be deemed a “filing” upon the date of deposit; see, Indiana Rule of Trial Procedure 5(F)(3), and the Rule’s correlating provision that “(f)iling by registered or certified mail and by third party commercial carrier shall be complete upon mailing or deposit”.³ As a result, in a circumstance in which a document was required to be filed with the court by – let’s say – March 2, 2009, and the author of the document did not complete it until after the closing of the court’s clerk’s office, it would still be possible to comply with the March 2, 2009 filing deadline by depositing the document in the mail, to be transmitted by certified or registered mail to the court, and thus comply with the applicable deadline. Similarly, many rules regarding filing by electronic means allow for filing of documents after the closing of the office in which the documents must ultimately be filed. As is true with rules that allow for the filing of mailed material to be complete upon deposit in the mail if done in a certain manner, electronic filing rules allow for filing of documents to be deemed complete although not delivered to the required recipient in tangible form until a time after the closing of the recipient’s office in which those documents are required to be filed.

Federal filing rules refer to materials to be filed with the court as “papers”; see,

³ For a case involving an interesting interplay between two conflicting rules concerning timely delivery of a mailed document, See, *Marlett v. State*, Ind. App., 878 N.E.2d 860 (2007).

Fed.R.Bankr.P. 5005(a)(1); Fed.R.Bankr.P. 5005(a)(2) [stating that “a document filed by electronic means in compliance with a local rule constitutes a written paper...” (Emphasis supplied)] . Because the media for transmittal of written material has drastically changed over the years, separate rules have been developed to define the concept of filing – i.e., delivery – to the court in a circumstance in which the actual recipient office is not open or otherwise available for actual physical delivery of those documents. In a very real sense, rules which accommodate electronic filing of documents within a time frame after closing of a clerk’s office are an accommodation to the parties filing documents, and by their very nature allow an additional period of time on the date upon which the documents are due for the documents to be filed to comply with a filing deadline. As a result, one should never lose sight of the fact that it would be perfectly permissible for a court to adopt an electronic filing rule which requires an electronically transmitted document to be actually received by the court’s server by the time on a particular day by which the document could be physically filed with the court’s clerk. A rule which goes beyond this time frame is a beneficent nod to the electronic filing era, and is actually an extension of the concept of “filing” which would otherwise adhere were “filing” to be defined solely by means of physical delivery to a clerk’s office.

With the foregoing in mind, we come now to the instant case. Analysis begins with the framework by which the “deadline” for filing complaints pursuant to 11 U.S.C. § 727(a) is established. That deadline is stated in Fed.R.Bankr.P. 4004(a) as follows:

(a) Time for filing complaint objecting to discharge; notice of time fixed

In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 reorganization case, the complaint shall be filed no later than the first date set for the hearing on confirmation. At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the

trustee's attorney.

The stated deadline may be extended pursuant to Fed.R.Bankr.P. 4004(b), which states the following:

(b) Extension of time

On motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

In the instant case, the deadline for the filing of the United States Trustee's complaint was extended to March 2, 2009. However, the deadline thus established is to be strictly applied, as stated as follows in *In re Messina*, 2003 WL 22271522 (Bankr. N.D.Ill. 2003):

Federal Rule of Bankruptcy Procedure 4004(a) governs the time period for filing a complaint objecting to discharge and provides that "[i]n a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." Fed. R. Bankr.P. 4004(a). Further, Bankruptcy Rule 4004(a) prescribes that the Court shall give a minimum of twenty-five days notice of the deadline for complaints objecting to discharge to the United States Trustee, all creditors, the trustee and the trustee's attorney. The Court may for cause extend the time to file a complaint objecting to discharge, but the motion must be filed before the time has expired. See Fed. R. Bankr.P. 4004(b). Thus, Bankruptcy Rule 4004(a) sets fixed deadlines for filing a complaint objecting to the debtor's discharge under § 727(a). The Seventh Circuit Court of Appeals has held that Bankruptcy Rule 4004 is not jurisdictional, and therefore, is subject to equitable defenses. *In re Kontrick*, 295 F.3d 724, 733 (7th Cir.2002), *cert. granted*, 538 U.S. 998, 123 S.Ct. 1899, 155 L.Ed.2d 824 (U.S. April 28, 2003) (No. 02-819). The Rule is a statute of limitations that the Debtor invokes as the principal basis of his motion to dismiss Counts I, II and III of the amended complaint. Because the Rule sets forth a statute of limitations, it must be strictly construed. See *Canganelli v. Lake County Ind. Dept. of Pub. Welfare (In re Canganelli)*, 132 B.R. 369, 383 (Bankr.N.D.Ind.1991); *Quaid v. Friedman (In re Friedman)*, 15 B.R. 493, 494 (Bankr.N.D.Ill.1981).

...

The Trustee's reliance on the lack of a deadline date set forth in the Clerk's Office notice of the first meeting of creditors as a basis for not applying Bankruptcy Rule 4004 is seriously misplaced and

unavailing. One leading treatise has noted that “the notice of the deadline for complaints objecting to discharge is normally made a part of the notice of the meeting of creditors.” 9 L. King, *Collier on Bankruptcy* ¶ 4004.02[4] at 4004-10 (15th rev. ed.2003) (footnote omitted). The text of Bankruptcy Rule 4004(a), however, does not require the notice sent by the Clerk's Office to specifically identify the deadline date for the filing of the complaint objecting to the discharge. Rather, the Rule simply states that the deadline for filing such complaints is “60 days after the first date set for the meeting of creditors under § 341(a).” See Fed. R. Bankr.P. 4004(a).

Arguably, the notice sent by the Clerk's Office was defective in that it did not specify the deadline date for filing objections to discharge. However, the Trustee, who is an experienced attorney and former bankruptcy judge, certainly cannot convincingly plead ignorance of the Bankruptcy Rules. The Trustee received the Clerk's Office notice setting the first meeting of creditors. As an experienced bankruptcy practitioner, a member of the panel trustees for many years and a former member of this Court, the Trustee was certainly able to calculate the sixty-day deadline for filing a complaint objecting to the Debtor's discharge, regardless of the fact that the notice he received did not calculate that date for him. The fact that the notice did not identify the deadline date does not relieve the Trustee, or any other creditor for that matter, from the duty to file a complaint within the time period prescribed by Bankruptcy Rule 4004(a). The Court finds that the deficient notice sent by the Clerk's Office does not excuse the mandatory deadline date provided by Bankruptcy Rule 4004(a).

In an analogous situation involving the filing of dischargeability complaints under 11 U.S.C. § 523(a), which must also be filed within sixty days after the date of the meeting of creditors under Bankruptcy Rule 4007, the Fifth Circuit held that a creditor was on notice of the time limit even though the clerk's office left the space for the deadline to file dischargeability objections blank, and the clerk's office gave subsequent assurances that no deadline had yet been set. See *Neeley v. Murchison*, 815 F.2d 345, 347 (5th Cir.1987). This reasoning was adopted by the Eleventh Circuit. See *In re Alton*, 837 F.2d 457, 460 (11th Cir.1988); *In re Williamson*, 15 F.3d 1037, 1039 (11th Cir.1994).

• • •

Next, the Trustee argues that Count III, which is based upon the Debtor's failure to obey a court order in violation of § 727(a)(6), should be allowed to proceed because there should be no time bar for filing complaints objecting to a debtor's discharge for the failure to obey a lawful court order. While the Trustee's policy argument is facially attractive, the Court rejects it as in derogation of the explicit language of Bankruptcy Rule 4004(a), which must

be strictly construed. Bankruptcy Rule 4004(a) does not make an exception for debtors who fail to comply with court orders in violation of § 727(a)(6). Rather, the Rule provides for a blanket sixty-day deadline for any type of behavior that would be subject to the denial of a discharge, including the failure to obey court orders as proscribed by § 727(a)(6). Accordingly, the Court rejects the Trustee's argument that Bankruptcy Rule 4004(a) does not apply to § 727(a)(6) objections to discharge as unsupported by any controlling authority and in complete disregard of the plain, unambiguous language of the Rule. Consequently, the Court grants the Debtor's motion to dismiss Counts I, II and III of the amended complaint as time barred under Bankruptcy Rule 4004(a).⁴

Thus, if the United States Trustee's complaint was not timely filed, it is subject to dismissal on the grounds established by Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6), by operation of the affirmative defense of "statute of limitations" provided by Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(c)(1).

In order to have been timely filed to defeat Streeter's motion to dismiss, the United States Trustee's complaint had to have been filed by March 2, 2009. Fed.R.Bankr.P. 5005(a)(1) required the complaint to "be filed with the clerk in the district where the case under the Code is pending". Fed.R.Bankr.P. 9029(a)(1) authorizes the United States Bankruptcy Court to "make and amend rules governing practice and procedure in all cases and proceedings within [its] bankruptcy jurisdiction which are consistent with – but not duplicative of – Acts of Congress and these rules . . .". N.D.Ind.L.R. 200.1(h) authorizes the United States Bankruptcy Court for the Northern District of Indiana to itself make rules governing its practice and procedure, in accordance with the provisions of Fed.R.Bankr.P. 9029(a)(1).⁵

⁴ The United States Trustee obviously does not dispute the concept that if the complaint was not timely filed – as timeliness is determined by applicable law and rules – the United States Trustee cannot seek to deny the debtor's discharge pursuant to 727(a).

⁵ Although the time deadline established by paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing is imposed by a General Order of the court – approved by the Judges of the United States Bankruptcy Court for the Northern District of Indiana in accordance with procedures applicable to General Orders – and not by a local rule, the United

Fed.R.Bankr.P. 5005(a)(2) states that a “court may by local rule permit . . . documents to be filed . . . by electronic means”, and that “a document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules . . .”. By means of the Fifth Amended Order Authorizing Electronic Case Filing, the court has permitted electronic filing, and has defined the parameters of electronic filing by various provisions of that rule, including paragraph 8. By means of the time deadline established by paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing, the United States Bankruptcy Court for the Northern District of Indiana has decreed by a validly promulgated rule that delivery is to be made to the court’s server in South Bend, Indiana, and that the time of delivery is to be measured by time at the location of the point of delivery. Fed.R.Bankr.P. 7003 incorporates the provisions of Fed.R.Civ.P. 3 into adversary proceedings. Fed.R.Civ.P. 3 states: “A civil action is commenced by filing a complaint with the court”. The term “action” is defined by Fed.R.Bankr.P. 9002(1), in the context of this dispute, as “an adversary proceeding”.

Based upon the foregoing, the court determines that the deadline for the filing of the United States Trustee’s complaint, as established by the United States Bankruptcy Court for the Northern District of Indiana, was midnight Eastern Standard Time on March 2, 2009. The complaint was therefore not timely filed.⁶

States Trustee has not raised any issue as to the applicability of the General Order in its context as a General Order, as contrasted to a local rule.

⁶ The United States Trustee advances a contention that an amendment to Fed.R.Bankr.P. 9006(a)(4) is supportive of her position. First, the court does not deem the rule -- effective as of December 1, 2009 -- to be applicable to this case. More importantly, the rule specifically provides that its general statement of a filing deadline as ending “at midnight in the court’s time zone” [which creates an issue as to which “court’s” time zone is referenced in a multi-time zone District] is subject to a local rule or order which sets a different time. Thus, Paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing is totally in accord with this rule.

The United States Trustee seeks to avoid the foregoing determination by reference to the case of *Kontrick v. Ryan*, 124 S.Ct. 906 (2004). *Kontrick* in part determined that the time proscription for filing a complaint under 11 U.S.C. § 727(a) stated in Fed.R.Bankr.P. 4004(a)/4004(b) is not jurisdictional. There is no issue raised in this case as to the court's lack of subject matter jurisdiction over the complaint based upon its alleged untimely filing, as well there should not be given that portion of *Kontrick's* determination. The issue actually determined by *Kontick* was stated as follows:

We granted certiorari in view of the division of opinion on whether Rule 4004 is "jurisdictional," 538 U.S. 998, 123 S.Ct. 1899, 155 L.Ed.2d 824 (2003), and we now affirm the judgment of the Seventh Circuit. (footnotes omitted)

124 S.Ct. 906, 913. The United States Supreme Court did not reach the issue of whether or not the time limitations stated in the Federal Rules of Bankruptcy Procedure could be altered by equitable considerations ["whether the Rules, despite their strict limitations, could be softened on equitable grounds is therefore a question we do not reach"; (footnotes omitted), 124 S.Ct. 906, 916]. As a result, the Seventh Circuit's opinion in *In re Kontrick*, 295 F.3d 724 (7th Cir. 2002), *Rehearing En Banc denied August 27, 2002*, is controlling with respect to whether equitable considerations may modify the strict filing deadlines established by applicable rules. In this context, the Seventh Circuit stated:

Accordingly, we join our colleagues in the Second and Fourth Circuits in holding that the timeliness provisions at issue here are not jurisdictional. See *In re Benedict*, 90 F.3d 50, 53-54 (2d Cir.1996); *Farouki v. Emirates Bank Int'l Ltd.*, 14 F.3d 244, 248 (4th Cir.1994). These rule provisions are subject to equitable defenses, although those defenses must be applied in a manner consistent with the manifest goals of Congress to resolve the matter of dischargeability promptly and definitively in order to ensure that the debtor receives a fresh start unobstructed by lingering doubts about the finality of the bankruptcy decree.^{FN4}

FN4. Contrary to Dr. Kontrick's assertion, we do not think that the Supreme Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280

(1992), requires a different result. *But see In re Leet*, 274 B.R. 695, 696-97 (BAP 6th Cir.2002). In *Taylor*, the Court held that there was no good-faith exception to the time limits for filing objections to a debtor's list of exempt property. *See Taylor*, 503 U.S. at 644-45, 112 S.Ct. 1644. Under 11 U.S.C. § 522(b), a debtor may claim certain property as exempt from his bankruptcy estate; the debtor may elect to use exemptions under state or federal law. *See* 11 U.S.C. § 522(b)(1)-(2). Section 522(1) describes the procedures for claiming such exemptions: "The debtor shall file a list of property the debtor claims as exempt.... Unless a party in interest objects, the property claimed on such list is exempt." *Id.* § 522(1). Bankruptcy Rule 4003(b) provides that "[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors." Fed.R.Bankr.P. 4003(b).

In *Taylor*, the debtor had claimed as exempt the proceeds from an employment discrimination lawsuit that was pending in state court at the time of her bankruptcy filing. *See Taylor*, 503 U.S. at 640, 112 S.Ct. 1644. The parties agreed that there was no basis for her to claim an exemption for the full amount of the proceeds. *See id.* at 642, 112 S.Ct. 1644. Nevertheless, the trustee declined to object to the exemption because he believed that the lawsuit was meritless. *See id.* at 641, 112 S.Ct. 1644. He was incorrect, and the debtor eventually settled for about \$110,000, a portion of which the debtor paid to her attorneys in the discrimination suit. *See id.* Upon learning of the settlement, the trustee returned to the bankruptcy court almost two years after the bankruptcy proceedings ended and demanded that the debtor and her attorneys turn over the funds on the ground that they were the property of the bankruptcy estate. *See id.* The trustee argued that the time limits in Rule 4003(b) only applied to exemptions filed in good faith and because the debtor had no good-faith basis for claiming the exemption, the trustee was able to file his objection outside of the time limit. *See id.*

The Supreme Court rejected this argument. *See Taylor*, 503 U.S. at 642, 112 S.Ct. 1644. The Court held that the deadline in Rule 4003(b) should be construed strictly: "By negative implication, the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.'" *Id.* at 643, 112 S.Ct. 1644. Since no objection was filed within 30 days, the property was exempt by the operation of 11 U.S.C. § 522(1). *See*

id. The Court noted that “despite what respondents repeatedly told him, [the trustee] did not object to the claimed exemption. If [the trustee] did not know the value of the potential proceeds of the lawsuit, he could have sought a hearing on the issue, see Rule 4003(c), or he could have asked the Bankruptcy Court for an extension of time to object.” *Id.* at 644, 112 S.Ct. 1644. Thus, the Court concluded that objections filed outside the time limit were untimely and should not have been considered by the bankruptcy court. *Id.* The Court further concluded that there was no statutory basis for reading a good-faith exception into § 522(1). See *id.* at 644-45, 112 S.Ct. 1644. The Court did not hold, however, that the debtor had an unlimited time in which to object to the trustee's untimely objection or that Rule 4003(b) was not subject to the usual equitable doctrines that apply to other deadlines and statutes of limitations.

While the Court in *Taylor* did stress the importance of deadlines, see *Taylor*, 503 U.S. at 644, 112 S.Ct. 1644, we believe this emphasis supports our conclusion, rather than undermines it. As the Court noted, “[d]eadlines may lead to unwelcome results, but they prompt parties to act and promote finality.” *Id.* This analysis applies with equal force to the doctrine of waiver, which requires parties to put all of their arguments before the appropriate court at the appropriate time for a full resolution of their claims. Here, parties are prompted to action and finality is served by our conclusion that parties may waive any objection to the untimeliness of a creditor's complaint if the objection is not raised at the proper time.

295 F.3d 724, 733. As stated in *In re Lopresti*, 397 B.R. 62, 66 (Bankr. N.D.Ill. 2008):

The Seventh Circuit Court of Appeals in *In re Kontrick*, 295 F.3d 724 (7th Cir.2002), *aff'd*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), held that the deadline in Bankruptcy Rule 4007(c) is not jurisdictional, and therefore, is subject to equitable defenses, *Id.* at 733. Those defenses include waiver, estoppel, and equitable tolling. *United States v. Locke*, 471 U.S. 84, 94 n. 10, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985); *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337, 344 (6th Cir.2003).

See, *In re Mirmingos*, 288 B.R. 521 (Bankr. N.D.Ill. 2003); *In re Trost*, 2006 WL 1520631 (Bank. C.D. Ill. 2006).

No assertion has been made by the United States Trustee as to equitable defenses of

waiver, estoppel, equitable tolling, or “unclean hands”. The gist of the United States Trustee’s assertion in invocation of *Kontrick* is “excusable neglect”.

First, as stated by the Honorable Robert E. Grant in *In re King*, 2006 WL 1994679 (Bankr. N.D.Ind. 2006):

Ignorance of a court's local rules does not excuse failing to comply with them. See, *Wakefield v. Northern Telecom, Inc.*, 13 F.2d 535, 542 (2nd Cir.1987). See also, *Pioneer Inv. Services. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392, 113 S.Ct. 1489 (1993); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2nd Cir.1994); *Bohlin Co. v. Banning Co.*, 6 F.3d 350, 356-57 (5th Cir.1993).

The court also notes that the provisions of Fed.R.Bankr.P. 9006(b)(1)(2) – which provide for an enlargement of time by means of a motion made after the expiration of a specified period, allow an “after the fact” extension of time with respect to matters under Fed.R.Bankr.P. 4004(a) “only to the extent and under the conditions stated in [that rule]”; Fed.R.Bankr.P. 9006(b)(3), and that the United States Trustee’s contentions do not meet this standard. Finally, the very limited exception to strict application of the statute of limitations provided for by *Kontrick, supra.*, allows only for certain “equitable defenses”. The parameters of these defenses were stated in *In re Phelan*, 420 B.R. 791, 793 (Bankr. N.D.Ill. 2009), as follows:

Among the equitable defenses to statutory filing deadlines are “the defenses of waiver, estoppel, and equitable tolling.” *Kontrick* at 730 (citing *United States v. Locke*, 471 U.S. 84, 94 n. 10, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985)). Furthermore, creditors have a Fifth Amendment due process right to “reasonable notice” before they can be deprived of the “basic and fundamental right” to participate in the case or proceeding and to challenge the debtor's right to a discharge of their claim. See *In re Walker*, 149 B.R. 511, 514-15 (Bankr.N.D.Ill.1992); see also *Tidwell v. Smith (In re Smith)*, 582 F.3d 767, 773-74 (7th Cir.2009).

Conspicuously absent from this recitation is the concept of “excusable neglect”. In delineating the parameters of *Kontrick*, the court in *In re Mirmingos*, 288 B.R. 521, 523 (N.D. Ill. 2003) stated:

In addition to the equitable defenses of unclean hands and estoppel, Mr. Mirmingos argues that his late filing is justified by “excusable neglect.” This argument is also unavailing. The “excusable neglect” standard is used to determine whether late filings may be permitted according to Bankruptcy Rule 9006(b)(1). See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Rule 9006(b)(1) does not apply to determinations of whether to extend deadlines under Rules 4004 or 4007, however. Fed. R. Bankr.P. 9006(b)(3). Rules 4004 and 4007 make no mention of “excusable neglect.” Further, unlike motions to allow late filing under Rule 9006 for “excusable neglect,” motions for extension of time under Rules 4004 or 4007 must be filed prior to the expiration of the sixty day deadline; there is no provision in those rules permitting filing after the deadline has passed absent a timely-filed motion for extension of time. While *Kontrick* allows these deadlines to be subject to equitable defenses, as far as I know, “excusable neglect” is not an equitable defense. Thus, Mr. Mirmingos may not argue “excusable neglect” as a defense to Mr. Benjamin’s motion to dismiss for untimely filing, and the bankruptcy court did not err in refusing to consider that defense. (Tr. of Nov. 12 Proceedings at 9.)

In memorandum materials filed with the court, the United States Trustee has somewhat vaguely asserted that the time computation provision stated in paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing “cannot be applied to shorten (read: alter) the deadline for filing a document”, and that application of the time limitation stated in that paragraph “may be prohibited by 28 U.S.C. § 2075, because local rules and protocols are not permitted to ‘abridge, enlarge or modify any substantive right’ “. As analyzed above, the General Order was promulgated in strict and total compliance with provisions of applicable rules which allow this court to define the concept of “filing” with the court, which includes the concept of the time at which filing is deemed to occur. These arguments of the United States Trustee are unavailing. Equally unavailing is citation to the case of *In re Dunaway*, 346 B.R. 449 (Bankr. N.D. Ohio 2006). In that case, the issue was not the strict timeliness of filing of a document, but rather the location in which the document was filed. The facts in *Dunaway* are totally inapposite to this case: this case does not involve the location of filing, but rather

involves the issue of when a stream of electrons was deemed to be received by the court for any purpose at any location of the court.

The United States Trustee further contends that paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing cannot be applied to shorten that which the United States Trustee denominates as a “substantive right” to file the § 727(a) complaint. As stated above, the rule does not abridge any right, but rather designates – as permitted by applicable laws and rules – the time at which the complaint was required to be filed. In its definition of that time, paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing does nothing more than implement the court’s authority to determine that definition, in conjunction with its authorization to define the manner in which filings are to be made with the court.

The United States Trustee also argues that somehow this court should invoke 11 U.S.C. § 105(a) in the context of this case. In advancing this argument, the United States Trustee again advances concepts of “excusable neglect”, citing the case of *Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership*, 113 S.Ct. 1489 (1993). As stated above, the concept of excusable neglect in any context with respect to the matter before the court does not apply to save the timeliness of the complaint. 11 U.S.C. § 105(a) is not a mechanism to be used by a federal bankruptcy court to save a party from the necessary fate of that party dictated by otherwise applicable law and rules: when the Bankruptcy Code and/or the Federal Rules of Bankruptcy Procedure decree a specific result, 11 U.S.C. §105(a) may not be employed to alter that result; *See, Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir. 2005). This argument is unavailing.

Finally, continuing to hunt with a dog that won’t hunt, in the context of the excusable neglect argument, the United States Trustee argues that Streeter will not be prejudiced if the Trustee’s complaint is deemed to be timely. This is an interesting argument, in that it is premised in part upon the assertion that three creditors have filed objections to discharge of

particular debts, and that the Chapter 7 Trustee's deadline for filing a § 727(a) action is still open. The foregoing being the case – especially in the context of the Chapter 7 Trustee's ability to file a § 727(a) complaint – the court turns the United States Trustee's contention back to its proponent: given that the Chapter 7 Trustee has the ability to file an action seeking the same relief as that sought by the United States Trustee, how is it that the United States Trustee is prejudiced by not being able to independently assert that action?

The bottom line in this case is essentially that an extremely experienced, extremely competent attorney was unaware of an applicable rule of the United States Bankruptcy Court for the Northern District of Indiana which defined the time frame for filing of a document with the court. Despite her extreme competence, that attorney simply made a mistake due to ignorance of an applicable defining rule. Paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing validly defines the concept of "filing" with the court, and the time at which a "filing" with the court is deemed to have been made. The deadline provided by Fed.R.Bankr.P. 4004(a), as extended in this case pursuant to Fed.R.Bankr.P. 4004(b), is circumscribed and defined by paragraph 8 of the Fifth Amended Order Authorizing Electronic Case Filing. The deadline for filing a § 727(a) complaint is strict, and the United States Trustee simply missed the deadline by seven minutes. In the context of a period of limitations, missing the limitation period by seven minutes is no different than missing the limitation period by seven years. Statutes of limitation do not give themselves up to "near misses". No equitable ground under *In re Kontrick*, 295 F.3d 724 (7th Cir. 2002) can be invoked to save the timeliness of the Trustee's complaint, and no other ground advanced by the United States Trustee can be utilized to cause the complaint to be deemed timely filed.

The court determines that the amended complaint filed by the United States Trustee in adversary proceeding number 09-2071 was not timely filed, and that Streeter's Motion should be granted. As a result, the amended complaint filed by the United States Trustee, and the

action initiated by that complaint, is dismissed with prejudice.

IT IS ORDERED, ADJUDGED AND DECREED that the amended complaint filed by the United States Trustee is dismissed with prejudice, and that consequently Adversary Proceeding Number 09-2071 is dismissed with prejudice as well.

Dated at Hammond, Indiana on September 10, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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